IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 502

ANGELO DI ORIO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

I

Summary Statement of the Matter Involved

A. Petitioner, together with Stanley Pawlowski, Russell Carkhuff, Raymond Carkhuff and Elizabeth Carkhuff, were tried in the United States District Court for the District of New Jersey upon an indictment containing five counts in substance charging (R. p. 4 et seq.).

FIRST COUNT

That during the period between January 1, 1944 and May 1, 1944, inclusive, at Branchburg Township, in the County of Somerset, they did knowingly, wilfully, unlawfully and feloniously conspire to commit offenses against the United States, i.e., to wilfully, unlawfully and feloniously have in their possession, custody and under their control a certain still of large capacity set upon the premises owned by or in possession of Elizabeth Carkhuff without registering the said still in the manner and form required by law; to wilfully and feloniously engage in and carry on the business of distillers; to wilfully and unlawfully make and ferment mash fit and intended for distilation; to knowingly and feloniously remove and abet in the removal of large quantities of distilled spirits produced at said still; to knowingly and unlawfully conceal and be concerned in the concealing of large quantities of distilled spirits in violation of Title 18, U. S. C. A., Section 88. It should be noted that the indictment does not contain a clause charging conspiracy by those named, "with divers other persons whose names are to the Grand Jurors unknown".

SECOND COUNT

That on April 26, 1944, at Branchburg Township, they did wilfully have in their possession, custody and under their control a certain setup still which they failed and neglected to register with the District Supervisor of the Alcohol Tax Unit contrary to the provisions of Title 26, I. R. C., Section 2810a.

THIRD COUNT

They did unlawfully engage in and carry on the business of a distiller, and did then and there distill a quantity of spirits subject to tax, with intent wilfully to defraud the United States of tax on spirits so distilled by them in violation of Title 26, I. R. C., Section 2823a.

FOURTH COUNT

That on April 26, 1944, they did wilfully and unlawfully make and ferment a quantity of mash fit for distillation in a certain building not then and there a distillery in violation of Title 26, I. R. C., Section 2834.

FIFTH COUNT

That on or about April 26, 1944, they did wilfully, knowingly conceal and were concerned in the concealment of about 265 gallons of distilled spirits for and in respect whereof a tax had been imposed, and which said tax had not been paid, with intent to defraud the United States of such tax in violation of Title 26, I. R. C., Section 2631a.

B. Petitioner's contention requires a detailed analysis of the evidence. At the trial, from such evidence as was competent and admissible against petitioner, it appeared that on April 26, 1944, at about 3:45 P. M., a group of State officers visited a farm in Branchburg, Somerset County, New Jersey (R. pp. 12, 13, 19, 89). The farm was owned by Elizabeth Carkhuff, who lived there with her sons, Russell and Raymond (R. pp. 89, 99). Raymond operated the farm (R. p. 99).

In addition to the farmhouse there are about nine buildings on the farm, including chicken coops, horse barns, cow barns, coolers, and the like (R. pp. 13, 100). All of the buildings were supplied with water from a single driven well (R. p. 99). The water system had been installed approximately eight or ten years prior to the officers' visit (R. p. 93). The aged appearance of the water pipes and the pit which housed the well confirmed this (R. pp. 36, 48).

The farm is on (in fact divided by) the Centerville-Readington Road and lies but a short distance from the point where that roadway intersects one of New Jersey's most traveled concrete highways—i.e., State Highway Route No. 29, also known as Old York Road (R. p. 89). The

farmhouse stands on one side of the Centerville-Readington Road, and upon the other side of that road, about 125 feet beyond the farmhouse, is a two-story building, at one time used as a horse barn (R. pp. 13, 19, 92).

The officers suspected that this building contained an unregistered still (R. p. 14). They asked Raymond Carkhuff to open its door (R. p. 14). He obtained a key from beneath a rock and opened the door (R. pp. 19, 20). Raymond discovered that the key was under the rock while he was cleaning up the farm, some time prior to the officers' visit (R. p. 101). He had picked up the stone, intending to discard it, and saw the key (R. p. 101). He replaced the rock on the key (R. p. 101).

When the officers entered the horse barn they found an illicit still, set up, but not in operation, and fifty-three five-gallon cans of alcohol, a quantity of sugar, coke, charcoal, yeast and vats filled with mash (R. p. 16). They promptly arrested Raymond Carkhuff, but permitted him to complete his farm chores under guard (R. pp. 38, 39). They also arrested Mrs. Elizabeth Carkhuff (R. pp. 14, 15).

Outside of the horse barn they noticed the old pit which housed the driven well (R. pp. 34, 35, 36). The water pump and electric motor appeared new (R. pp. 35, 36). Russell Carkhuff testified that in February 1944 the water pump broke, and conditions made it difficult to obtain a new one (R. p. 94). A gentleman, who he had never seen before, but who he described (neither Pawlowski nor petitioner), said he could furnish a new pump, which he did (R. pp. 94, 96). Stanley Pawlowski installed it (R. p. 94).

At or about 6 P. M. Stanley Pawlowski drove his automobile along the Centerville Road and stopped near the horse barn. He did not approach that structure, but attempted to enter a building opposite (R. p. 20). The building he attempted to enter was in nowise connected with the illicit enterprise. The officers (who were hiding) appeared and arrested him. He said, "I am only up here to buy eggs. What do you fellows want?" (R. p. 20). He

was taken to the kitchen of the farmhouse and kept there in custody (R. p. 24).

Russell Carkhuff testified that he had seen Pawlowski at the farm in February, 1944, when he "installed the pump and fixed the pipes" (R. pp. 97, 98). That work was performed outside of the building where the still was found. He did not see Pawlowski enter that building or work in it (R. p. 98).

Raymond Carkhuff testified that he had seen Pawlowski at the farm a few times, including the occasion when he installed the pump. On that occasion he saw him enter the horse barn (R. pp. 102, 103). There was no competent testimony that Pawlowski had ever set up the still or operated it.

At or about 9 P. M. Russell Carkhuff drove an automobile along the road and stopped near the farmhouse. After he alighted, he was placed under arrest and kept in custody in the kitchen of the farmhouse (R. p. 24).

Shortly thereafter petitioner appeared upon the scene. He is married and lives with his wife and family at No. 325 Clifton Avenue, Newark, New Jersey. He was employed as a utility and maintenance man for the Fast Trucking Corporation, which operated a fleet of motor trucks and trailers (R. p. 71). When trucks broke down on the road, it was petitioner's duty to go to their aid (R. pp. 70, 84). Petitioner knew Stanley Pawlowski for a number of years (R. p. 70). Pawlowski operated a diner in South River, New Jersey (R. p. 75). Pawlowski had borrowed $250 from him at Christmastime, 1943, and had promised to repay within a month. That promise and many others were not kept (R. p. 71). Petitioner became irked and drove to Pawlowski's home to demand payment (R. p. 72). He arrived there at about 8 P. M. and Pawlowski was out (R. pp. 72, 84). He conversed with Pawlowski's wife, who told him that Pawlowski might be found at the Carkhuff farm (R. p. 72). Petitioner had never been to the farm before, but Mrs. Pawlowski told him where the farm was located and how to get there (R. p. 72). When he arrived in the

neighborhood of the farm he received additional directions as to its location from the proprietor of a gasoline filling station (R. p. 73). As he turned from Route 29 onto the Centerville Road he did not extinguish his headlights (R. p. 74). The officers claimed he did (R. p. 24). He reasoned that Pawlowski had driven his automobile to the farm (R. p. 74). He drove very slowly as he approached the farmhouse and eyed its surroundings in the hope of detecting an automobile bearing a Middlesex County motor vehicle license (R. p. 75). He did not see such an automobile and passed the farmhouse, intending to turn back and resume to the State Highway (R. p. 75). Suddenly four or five strangers appeared displaying pistols and a pitchfork and some of them leaped on his automobile (R. p. 75). The officers claimed that his automobile stopped near the horse barn (R. pp. 24, 26, 45). However, it was undisputed that Officers Webster and Kaufman, without identifying themselves and with their guns drawn, rushed from their hiding places and pulled open the door of the automobile and shouted, "Get out and get your hands up" (R. pp. 24, 26, 45, 72).

Petitioner, visibly frightened, raised his hands and ejaculated, "All right, you got me. Let's get it over with." He believed the strangers were bent on robbery or violence and hoped to avert their use of firearms by indicating that he did not intend to resist (R. p. 76).

The officers removed him from the automobile and placed handcuffs upon him and identified themselves (R. pp. 26, 76). They took him into the kitchen of the farmhouse (R. pp. 26, 76). There he saw Elizabeth, Russell and Raymond Carkhuff, Stanley Pawlowski and several officers (R. p. 77). He had never seen any of the Carkhuffs before, nor had any transactions with them (R. p. 77). They stated (in the presence of the officers) that they did not know him and had never seen him before (R. pp. 28, 46). The officers requested his name and address, which he furnished (R. p. 78).

He is tall and thin. While he was still suffering the effects of his terrifying experience, one of the officers put a question to him which was couched to entrap and lure him into an admission. The officer asked, "Slim, isn't this the first time you ever came into one of your stills?" (R. p. 26). The officers claimed he answered, "Yes, God damn it, this is the first time. I ought to have my head examined" (R. p. 27). Petitioner insisted that he said, "What do you mean my still? God damn it, I should have my head examined for being here" (R. p. 79).

Another officer who was present would not say that petitioner made the answer attributed to him (R. p. 53).

Waxing sarcastic at the melodramatic performance to which he had been subjected by the officers, he turned to one of them and said, "Well, I guess that is another feather in your hat" (R. p. 50).

In the meantime the officers had searched petitioner's automobile. They found nothing in it but two small window screens (R. p. 26). The defendant was not dressed in working clothes. He had about $600 in cash upon his person (R. p. 85). Nothing of an incriminating nature was found in the automobile or on his person.

He asked Pawlowski "What it was all about" and Pawlowski said, "Search me, I have been here three hours" (R. p. 80).

The officers insisted on taking petitioner and Pawlowski to the horse barn (R. p. 28). Petitioner protested, saying, "Why are you bringing me here? I do not know anything about this" (R. p. 28).

No one challenged his statement or directed his attention to his alleged earlier admission.

After he had been detained in the kitchen for several hours, he asked the officers why they were holding him (R. p. 80). He insisted upon an immediate arraignment, which was his right, and asked, "What are we waiting for?" He claimed that the officers replied, "Well, we are waiting for some cars to come down and more people to be in here." Petitioner said, "Let's get out of here. What do we have

to wait here for? I don't want to be hanging around here." The officers claimed their reply was, "Well, we have a lot of things to do yet." They insisted petitioner then said, "Let us go. There won't be any more men here tonight" (R. p. 51). The defendant denied making that reply (R. p. 80).

After his protest he was taken before a Justice of Peace and at 3 A. M. arraigned upon a complaint charging a violation of the State liquor statute (R. p. 54). He entered a plea of not guilty (R. p. 54). He denied having anything to do with the still on the Carkhuff farm (R. p. 47). He was then taken to the Somerset County Jail (R. p. 46).

He categorically denied the charges laid in the indictment (R. pp. 82, 83).

During the trial, Elizabeth Carkhuff became ill and the Court ordered a severance as to her and a nolle prosequi was subsequently entered (R. pp. 2, 4). Russell Carkhuff stated he learned there was a still on his mother's farm some time in February (R. p. 91). He spoke to his mother about it, but made no report to the authorities because he feared it might bring her trouble (R. p. 91). He denied the charges in the indictment (R. p. 93). He denied having anything to do with the operation of the still and denied associating with those who operated it (R. p. 93). Raymond Carkhuff also discovered that the still was in the horse barn in February (R. p. 101). He told his mother he was displeased at its being there (R. p. 101). He denied having anything to do with the operation of the still and the charges laid in the indictment (R. pp. 100, 101).

At the close of the government's case petitioner moved for a dismissal (R. p. 69). At the close of the entire case petitioner made a motion for acquittal addressed to each count of the indictment (R. p. 103). The Court denied the motions. The jury acquitted Raymond Carkhuff and Russell Carkhuff (R. p. 2). Petitioner and Stanley Pawlowski were found guilty on all counts (R. p. 2). Petitioner was sentenced to imprisonment of two years on Count One, to

be followed by imprisonment of one year and one day on Count Two, to be followed by imprisonment of one year and one day on Count Three, to be followed by imprisonment of one year and one day on Count Four and to imprisonment of three years on Count Five, said term of imprisonment to run concurrently with the terms of imprisonment of Counts One and Two. He was also sentenced to pay a fine of $1,000 on Count One, a fine of $500 and a penalty of $500 on Count Two, a fine of $1,000 on Count Three, a fine of $1,000 on Count Four and a fine of $1,000 on Count Five, and he was ordered to stand committed until said fines were paid (R. pp. 2, 3).

The conversations which the officers claimed they had with the other defendants after the seizure and after the defendants had been arrested, and out of the presence of petitioner, are not included, since they were not admissible or competent as to him.

II

Jurisdictional Statement

An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which filed its opinion affirming the judgment of conviction on August 14, 1945 (R. p. 131). A petition for rehearing was filed in due course and was denied on September 8, 1945 (R. p. 143).

The opinion of the Court below has not yet been reported.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule XI of the Rules for Criminal Appeals, promulgated by this Court on May 7, 1934.

III

Questions Presented

The questions presented are:

(1) Whether petitioner was convicted by means of admissions that were not adequately corroborated by independent evidence.

(2) Whether in the federal courts a defendant can be convicted through the use of admissions that have not been corroborated by independent evidence which establishes each element of the corpus delicti.

(3) Whether there was sufficient competent testimony of petitioner's guilt to justify the submission of the case to the jury.

IV

Reasons for Allowance of the Writ

1. The Circuit Court of Appeals decided that petitioner's admissions were required to be corroborated by independent evidence of the corpus delicti, but held that "proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti" (R. p. 134). The decision in this respect conflicts with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Hancey* v. *United States*, 108 F. (2d) 835, where that Court held:

> "In every criminal prosecution the burden rests upon the government to prove the corpus delicti—that is, that the crime charged has actually been committed and that the accused committed the crime. By corpus delicti is meant the body of the crime; that is, all the elements necessary to constitute the crime charged."

2. The Circuit Court of Appeals failed separately to consider the various elements of the crimes charged against petitioner. It erroneously treated with the various essential elements of the crimes charged, such as scienter, intent to defraud, and the like, as if they formed part of the proof of identity. Accordingly, it affirmed, notwithstanding the record is barren of any independent corroborative proof reaching those essential elements of the crimes. In this respect the decision in the case at bar conflicts with the decision of the Court of Appeals for the District of Columbia in *Forte* v. *United States*, 94 F. (2d) 236, and the decision of the Eighth Circuit in *Pines* v. *United States*, 123 F. (2d) 825, and *Tingle* v. *United States*, 38 F. (2d) 573. In the *Forte* case the Court held:

> "It is to be noted, however, that in certain types of crimes involving *scienter* on the part of the accused it is not possible to separate, either conceptually or practically—that is in respect of the proof—the *scienter*, as an element of the *corpus delicti*, and the agency of the accused. So in the crime of receiving stolen goods knowing them to be stolen, and in the crime at bar, it is not possible to separate, either conceptually or practically, the element of guilty knowledge in the transportation and the element of agency of the accused as the criminal. But this cannot operate to diminish the duty of the Government to present evidence of both elements of the *corpus delicti* independent of the confession." (Italics by the Court.)

3. To establish the conspiracy charged in the First Count of the indictment the government was required to prove the existence of the conspiracy as charged and petitioner's intentional participation after knowledge thereof. "Those having no knowledge of the conspiracy are not conspirators." *United States* v. *Falcone*, 311 U. S. 205, 210. Proof of knowledge must be clear, not equivocal, and cannot be supplied by piling inference upon inference. *Direct Sales Company* v. *United States*, 319 U. S. 703, 711.

Knowledge of the conspiracy could not be inferred from petitioner's association with Pawlowski. Prior to his arrest petitioner did not know and had never met the Carkhuffs (R. pp. 28, 46, 77).

Knowledge of the offense, which is the object of the conspiracy and even participation therein, is not sufficient to establish knowledge of the conspiracy. *Dickerson* v. *United States* (C. C. A. 8), 18 F. (2d) 887, 893.

To support its conclusion, that there was independent evidence of the corpus delicti, the Circuit Court referred to a series of circumstances (R. p. 135). These it held justified the conclusion that there was an unlawful agreement between Mrs. Carkhuff, her son Raymond and Pawlowski (R. p. 135). There was no competent evidence whatever that Pawlowski had set up the still or had repaired it. Ownership of the barn and knowledge that liquor was being manufactured therein was not sufficient to establish a conspiracy or knowledge thereof. Knowledge, acquiescence or approval of the act without some evidence of participation is not enough. *Norris* v. *United States* (C. C. A. 3), 34 F. (2d) 839, 842; *Tingle* v. *United States* (C. C. A. 8), 38 F. (2d) 573, 575; *Di Bonaventura* v. *United States* (C. C. A. 4), 15 F. (2d) 494; *United States* v. *Stappenback* (C. C. A. 2), 61 F. (2d) 955.

Participation may not be implied from the mere fact that one with a knowledge that an offense is being committed does not report it to the proper authorities or take steps to prevent it. *Boyett* v. *United States* (C. C. A. 5), 48 F. (2d) 482. The circumstances which the Circuit Court referred to are as consistent with innocence as with guilt, and are therefore robbed of all probative value. *Turinetti* v. *United States* (C. C. A. 8), 2 F. (2d) 15, 16.

Moreover, the jury found that Raymond Carkhuff and Russell Carkhuff were not conspirators. Their acquittal removed them from the alleged conspiracy. *Tofanelli* v. *United States* (C. C. A. 1), 28 F. (2d) 581, 582; *United States* v. *Fox* (C. C. A. 3), 130 F. (2d) 56.

But assuming, arguendo, that a conspiracy did exist among the others, there was no independent corroborative proof which established that petitioner knew of its existence. To establish this important element of the crime the government relied wholly upon petitioner's uncorroborated admissions. The Circuit Court erroneously regarded this important element of the crime as part of the element of identity. The mere fact that petitioner approached the farm under suspicious circumstances and stopped on the roadway near the horse barn did not establish knowledge. There was no sufficient competent evidence of the crime charged in this count to justify submitting it to the jury.

4. That the Circuit Court of Appeals treated with the various essential elements of the substantive crimes, charged in the other counts of the indictment, as if they formed part of the proof of identity, can be demonstrated by a discussion of one of those counts.

The intent to defraud the United States is of the very essence of the offense charged in the Third Count. *United States* v. *Simmons*, 96 U. S. 360, 364; *Partson* v. *United States* (C. C. A. 8), 20 F. (2d) 127, 128.

The government was further required to prove that petitioner was in fact "carrying on the business of a distiller"—that is, that he was the proprietor or owner and liable for the tax. *United States* v. *Cooper* (C. C., E. D. Tenn.), Fed. Cas. No. 14,863, 25 Fed. Cas., p. 627; *United States* v. *Logan* (C. C., E. D. Tenn.), Fed. Cas. No. 15,624, 26 Fed. Cas., p. 990; *Partson* v. *United States* (C. C. A. 8), 20 F. (2d) 127, 128; *Anderson* v *United States* (C. C. A. 5), 30 F. (2d) 485, 487.

There was no independent proof that petitioner had any financial interest in any of the real or personal property in or on the Carkhuff farm. There was no independent proof whatever that prior to his arrest he had ever been at the farm. Proof of the existence of an unregistered still, not in operation, and unattended by anyone; and the presence of mash, alcohol, etc., inside the barn where it was dis-

covered, did not establish that petitioner had a proprietary interest therein or was liable for the tax. Nor did it establish his intent to defraud the United States of tax. The presence of the untaxed spirits at the place where they are produced does not establish an intent to defraud the United States of tax. *Seiden* v. *United States* (C. C. A. 2), 16 F. (2d) 197, 198). The fact that petitioner approached the farm in a manner that aroused suspicion, and stopped on the roadway near the horse barn, did not establish these essential elements of the corpus delicti. Nothing of an incriminating nature was found in his automobile or on his person. He was not dressed in working clothes. *Girgenti* v. *United States* (C. C. A. 3), 81 F. (2d) 741; *United States* v. *DeVito* (C. C. A. 2), 68 F. (2d) 837, 839.

The government relied entirely upon petitioner's uncorroborated admissions to establish these elements of the crime.

The Circuit Court erroneously deemed them a part of the proof of identity that required no corroboration.

Without independent corroborative proof of these essential elements of the offense, the Trial Court was required to grant the motion for a directed verdict of acquittal.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of the Circuit Court of Appeals may be reversed and that petitioner may have such other and further relief in the premises as this Court may deem appropriate.

ANGELO DI ORIO,
Petitioner.

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CITATIONS

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ANGELO DI ORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 131–137) is reported at 150 F. 2d 931.

JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1945 (R. 138), and a petition for rehearing was denied September 8, 1945 (R. 143). The petition for a writ of certiorari was filed October 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was sufficient independent evidence of the corpus delicti to corroborate incriminating admissions made by petitioner at the time of his arrest.

STATEMENT

An indictment in five counts was returned against petitioner and others in the United States District Court for the District of New Jersey, charging (1) a conspiracy to violate the internal revenue laws relating to distilleries, (2) possession of an unregistered still, in violation of 26 U. S. C. 2810 (a), (3) unlawfully engaging in the business of a distiller with the intent to defraud the United States of taxes, in violation of 26 U. S. C. 2833 (a), (4) making and fermenting mash in a building not then a distillery, in violation of 26 U. S. C. 2834, and (5) concealing spirits on which the tax had not been paid with intent to defraud the United States of such tax, in violation of 26 U. S. C. 3321 (a) (R. 4–11). Petitioner and a codefendant, Pawlowski, were convicted on all counts (R. 2). Petitioner was sentenced to imprisonment for two years on count 1, and one year and one day on each of counts 2, 3 and 4, the sentences to run consecutively; and three years on count 5, to run concurrently with the prison terms imposed on counts 1 and 2. He

was also sentenced to pay fines and penalties totalling $5,000. (R. 2–3.) On appeal, the judgment was affirmed (R. 138).

The evidence for the Government may be summarized as follows:

On April 26, 1944, at about 3:45 P. M., federal alcohol agents and state officers discovered a set-up still in a barn on a farm owned by Mrs. Carkhuff (R. 12–13, 15–16, 19–20, 37–38).[1] In the barn were cans of alcohol and wooden vats filled with mash (R. 16, 18, 38). The still was supplied by the same water system which furnished water to the farm dwelling. There was a new electric motor and a new pump which had been supplied without cost to the Carkhuffs and installed by the defendant Pawlowski (R. 34–35, 94).

After discovering the still, the agents concealed their cars and remained in hiding (R. 20). At about 6:00 P. M. Pawlowski drove up to the still and was arrested (R. 20, 39). At about 9:30 P. M. a car was observed coming down the main road toward the farm. When it neared the lane leading to the farm, the head lights were extinguished and the car could be heard approaching the farm. It was driven past several small barns to a spot about ten feet away from the still. (R. 24, 39.) As petitioner, the driver of the car,

[1] Mrs. Carkhuff and her two sons were also indicted as co-conspirators (R. 5). The trial was severed as to Mrs. Carkhuff, and the two sons were acquitted (R. 2).

opened the door, the agents rushed up and told him to put up his hands. He said, "All right, you got me. Let's get it over with" (R. 26, 40). Petitioner was taken to the farm house by several of the agents. One of them said to him, "Slim, isn't this the first time you ever came into one of your stills?" and petitioner replied, "Yes, God damn it, this is the first time. I ought to have my head examined." (R. 26–27, 41.) Petitioner told another agent, "Well, I guess that is another feather in your hat" (R. 50). After petitioner had been held for a time, he said, "Let us go, there won't be any more men here tonight" (R. 51).

ARGUMENT

Petitioner's contention that his conviction is based upon his admissions alone, unsupported by independent proof of the corpus delicti (Pet. 10–14), seems to rest on the assumption that the corroborative proof must in itself establish guilt beyond a reasonable doubt. It is, however, well established that the independent evidence of the corpus delicti need not be "so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of the defendant's guilt beyond a reasonable doubt." *Jordan* v. *United States,* 60 F. 2d 4, 5 (C. C. A. 4), certiorari denied, 287 U. S. 633; see also *Evans* v. *United States,* 122 F. 2d

461, 465 (C. C. A. 10), certiorari denied, 314 U. S. 698; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Forte* v. *United States,* 94 F. 2d 236, 240 (App. D. C.). And, as the court below pointed out (R. 134), "proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." *George* v. *United States,* 125 F. 2d 559, 563 (App. D. C.); *Anderson* v. *United States,* 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *United States* v. *Marcus,* 53 Fed. 784, 786 (C. C. S. D. N. Y.), error dismissed, 159 U. S. 259.[2]

Judged by these standards, it is clear that there was sufficient evidence of the corpus delicti of each of the crimes charged in the indictment. As to the substantive offenses, the existence of the still, the presence of illegal mash and of untaxpaid spirits, were established by the independent evidence of the officers who made the raids. Petitioner argues (Pet. 13–14) that there was no proof of intent to defraud, an element of the offenses charged in counts 3 and 5, or of the fact that the defendants were "carrying on the business of a distiller," an element of the offense

[2] The statement in *Hancey* v. *United States,* 108 F. 2d 835 (C. C. A. 10), which petitioner quotes (Pet. 10) is dictum, contrary to the great weight of authority.

charged in count 3. Manifestly, however, such elements of the offenses may be, and in most instances necessarily must be, established by circumstantial evidence. See *One 1941 Ford ½ Ton Pickup A Truck, Etc.* v. *United States,* 140 F. 2d 255, 257 (C. C. A. 6). The circumstances under which the still here involved was found amply justify the inference that the still was an illicit one, used to carry on a business with the intent to defraud the United States of taxes. Cf. *Scott* v. *United States,* 145 F. 2d 405 (C. C. A. 10), certiorari denied, 323 U. S. 801; *United States* v. *David,* 107 F. 2d 519 (C. C. A. 7); *Weeke* v. *United States,* 14 F. 2d 398 (C. C. A. 8), certiorari denied, 273 U. S. 662.

As to the conspiracy count, evidence that the still was concealed in a barn on the Carkhuff farm, that Pawlowski was arrested at the still, that the pump which supplied water to the still and the farm house was supplied without cost to the Carkhuffs and installed by Pawlowski, was enough to suggest that the still was operated pursuant to the agreement of more than one person. It was thus sufficient to constitute independent proof of an agreement, the corpus delicti of a conspiracy charge. Petitioner contends (Pet. 11–13) that his knowledge of the existence of the conspiracy is also an element of the corpus delicti which must be proved independently, on the principle enunciated in *Forte* v. *United States,* 94 F.

2d 236 (App. D. C.), that, where scienter is an element of the offense, it must be established by independent evidence. However, the crime charged in the *Forte* case was the transportation of stolen property knowing it to be stolen, a type of crime in which proof of scienter itself may be thought to require proof of the identity of the perpetrator of the crime. But in conspiracies, the corpus delicti is merely the agreement between two or more persons, and proof of knowledge of the agreement on the part of a particular defendant is a matter bearing only on the separate question of his identity as one of the conspirators. Petitioner's knowledge of the existence of the conspiracy could therefore be proved by his admissions alone. *Anderson* v. *United States,* 124 F. 2d 58, 66 (C. C. A. 6), reversed on other grounds, 318 U. S. 350; *Ryan* v. *United States,* 99 F. 2d 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635. Moreover, even if independent proof of petitioner's knowledge was required, that fact was independently established by testimony showing that petitioner was sufficiently familiar with the premises where the still was kept to drive to it past several buildings at night without headlights.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit

that the petition for a writ of certiorari should be denied.

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